


STATE OF CALIFORNIA  
STATE AND CONSUMER SERVICES AGENCY  
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Office Use Item No. \_\_\_\_\_

**PARTICIPATION COMMENTS FOR THE NOTICE DATED AUGUST 24, 2012**  
Written comments are to be sent to the above address.

**WRITTEN COMMENT DEADLINE: OCTOBER 8, 2012**

Date: 10/05/2012

From: Margaret Crosby  (Signature)  
Name (Print or type)  
Attorney, American Civil Liberties Union of Northern California  
Agency, jurisdiction, chapter, company, association, individual, etc.  
39 Drumm St., San Francisco CA 94111  
Street City State Zip

I/We (do)(do not) agree with:

☒ The Agency proposed modifications As Submitted on Section No. 217(2)

and request that this section or reference provision be recommended:

[ ] Approved ☒ Disapproved [ ] Held for Further Study [ ] Approved as Amended

**Suggested Revisions to the Text of the Regulations:**

Delete "that do not provide abortion services" from 217(2)

**Reason:** [The reason should be concise if the request is for "Disapproval," "Further Study," or "Approve As Amend" and identify at least one of the 9-point criteria (following) of Health and Safety Code §18930.]

The discriminatory treatment of primary care facilities that provide first trimester abortions is not justified by legitimate health and safety concerns and is thus contrary to the public interest and unconstitutional. See attached analysis.

**Proposed Regulation 217.0: OSHPD 3SE excludes: “(2) Primary Care Clinics that do not provide abortion services.”**

The California Constitution strongly protects access to abortion. As our Supreme Court has stated: “By virtue of the explicit protection afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state - rich or poor - is guaranteed the constitutional right to make that decision *as an individual*, uncoerced by governmental intrusion.”<sup>1</sup> In addition, the California Legislature has declared as the state’s public policy: “Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion.”<sup>2</sup> To safeguard women’s childbearing decisions, California courts closely scrutinize restrictions placed on abortion providers, for they significantly affect access to abortion. The state may not legally impose special burdens on doctors and other clinicians because they provide abortion services, unless it can prove that the restrictions are narrowly tailored and necessary to protect women’s health.

The proposed wholesale exemption of all facilities that include abortion services—including very early abortions—from the new streamlined OSHPD 3SE regulations for primary care clinics is medically unjustified. As explained in greater detail by Planned Parenthood Affiliates of California, women terminate first trimester pregnancies either by taking pills or by a gentle aspiration procedure lasting under 5 minutes that does not involve cutting or suturing tissue. When performed by trained clinicians, these early abortions are safe and common, posing less risk of infection than many other procedures performed in primary care clinics eligible for the OSHPD 3SE classification. Thus, the state could not meet its heavy burden of proof in a lawsuit challenging the constitutionality of this disparate treatment of abortion providers.

Because California’s constitutional protection for access to abortion is far more stringent than the federal Constitution, this state may not justify imposing special burdens on abortion providers by showing that they mirror national standards. Throughout the country, states have created burdensome and expensive requirements for abortion providers, known as “TRAP” (targeted regulation of abortion providers”) laws. Some have been struck down, and some upheld, in court challenges, under the far more deferential standard applied by federal courts. California courts

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<sup>1</sup> *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252 (1981). See also, *Planned Parenthood of Santa Barbara v. City of Santa Marita*, 16 Cal. App. 4<sup>th</sup> 685 (1993) (restrictions on providing abortion imposed as a condition of receiving funds for clinic construction are unconstitutional).

<sup>2</sup> Health & Safety Code Section 123462(b).

would not find these precedents relevant. In major areas, such as abortion funding<sup>3</sup> and parental consent for minors' abortions,<sup>4</sup> the California Supreme Court has departed from federal precedents.

What a California court *would* find highly relevant is that the state does not require doctors and other licensed clinicians in private practice who provide first trimester abortion services to have facilities with special, expensive plumbing and ventilation. If these building supplies were necessary to protect the health of women obtaining early abortions, private patients would have experienced injuries and the state would have imposed these regulations.

The new OSHPD 3SE classification represents an important step forward in facilitating access to primary care. Denying those benefits to clinics that provide early abortions is a huge step backwards. It will exacerbate a problem women face in underserved areas of the state. Almost half of the counties in California have no accessible provider, requiring women to travel a significant distance to terminate a pregnancy. OSHPD is well aware of these problems, which are addressed in Health Workforce Pilot Project No. 171. As stated in SB 623, recently signed by Governor Brown, the bill extending that project, "HWPP No. 171 is likely to increase the availability of safe, early abortion care that is limited in many areas of California." Imposing burdensome, expensive, unnecessary building requirements on primary care clinics that include early abortion services undermines the important goal of improving access to care for the state's most vulnerable women.

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<sup>3</sup> Compare *Committee to Defend Reproductive Rights, supra*, with *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>4</sup> Compare *American Academy of Pediatrics v. Lungren*, 16 Cal. 4<sup>th</sup> 307 (2007) with *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992).